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Nos. 97-1184, 97-1243

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1998

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309,
*Petitioner,*
v.
UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*

FEDERAL LABOR RELATIONS AUTHORITY,
*Petitioner,*
v.
UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*

**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## REPLY BRIEF FOR THE PETITIONER NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309

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## REPLY BRIEF FOR THE PETITIONER NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309

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A. This Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), mandates deference to the Federal Labor Relations Authority's decision here. Evidently recognizing the obstacles presented by *Chevron* to reversal of the FLRA, respondents claim that Congress "directly" addressed the issue presented and "deliberately" excluded a general midterm

bargaining obligation. Resp. Br. at 10. They argue, more specifically, that the "plain language" (*id.* at 22) of the Federal Service Labor-Management Relations Statute (Statute or FSLMRS), 5 U.S.C. 7101-7135, generally "excludes" (*id.* at 15) midterm bargaining from the scope of an agency-employer's duty to negotiate. Even the Fourth Circuit—whose reasoning respondents purport to defend here—never made such a claim. Instead, that court stated that a "textual analysis" did not yield a "definitive" answer to the midterm issue presented. *Social Sec. Admin. v. FLRA*, 956 F.2d 1280, 1284 (4th Cir. 1992).

For the respondents, the "key to deciding this case" (Resp. Br. at 19) is the language of section 7114(a)(4) of the Statute, 5 U.S.C. 7114(a)(4), and the alleged "striking contrast" (Resp. Br. at 19) between that provision and the language used in the National Labor Relations Act (NLRA), 29 U.S.C. 151-168. These "key" elements of respondents' argument do not withstand scrutiny.

1. The linchpin of respondents' textual argument is their claim that, although the NLRA broadly instructs employers to bargain collectively, the FSLMRS requires federal employers only to negotiate for the purposes of "arriving at a collective bargaining agreement." 5 U.S.C. 7114(a)(4). According to respondents, this phrase specifically confines a federal agency-employer's duty to bargain to the negotiation of only one basic comprehensive agreement. This argument contains several fundamental flaws.

Respondents' misinterpretation of the phrase "arriving at a collective bargaining agreement" is evident from an examination of the duty to bargain established under the NLRA and that Act's illuminating legislative history. Together, they make it clear that the phrase is not subject to the limiting interpretation here urged by respondents.

From its inception, the NLRA has required employers to bargain with designated employee representatives. 49

Stat. 449, 452-53 (1935); 29 U.S.C. 151-168. Moreover, that obligation has always included the requirement that employers bargain midterm regarding union proposals; indeed, before the original version of the statute, the Wagner Act, was amended by the Taft-Hartley Act, that obligation was unconstrained. *NLRB v. Sands Mfg. Co.*, 306 U.S. 332, 342-344 (1939).

The Senate report accompanying the bill that became the Wagner Act explained Congress' understanding of that broad duty to bargain collectively and is particularly instructive here. The original Act simply stated that it was "an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . . ." 49 Stat. at 452-53. To elaborate on that terse statement, the report explained—in terms parallel to those later adopted in the FSLMRS—that the duty to bargain encompassed the obligation to negotiate with employee representatives in order "to *arrive at* a collective bargaining agreement." S. Rep. No. 74-573, at 12 (1935) (emphasis added). Absent an obligation imposed on the parties to expend bona fide efforts in trying to reach agreement, the report emphasized, the employees' right to bargain collectively would be "a mere delusion." *Id.*

The NLRA's legislative history thus reveals that the phrase "negotiate . . . to arrive at a collective bargaining agreement" describes only the ultimate goal of any bona fide negotiation: the conclusion of an agreement. And, because the duty to bargain under the NLRA was sweeping, the agreements to be "arrived at" included not just "basic" term agreements but other kinds of collective bargaining agreements as well—most notably, for present purposes, midterm agreements.

In short, the Senate report's use of the phrase "arrive at a collective bargaining agreement" conclusively refutes respondents' key premise that the phrase "confines" (Resp. Br. at 19) the duty to bargain to the negotiation of only

one comprehensive agreement encompassing a particular time frame. The legislative history of the NLRA, the Act deemed so crucial by respondents, firmly establishes the error of respondents' contention (Resp. Br. at 17-18) that "throughout this century" the term "collective bargaining agreement" has referred only to a "comprehensive" labor agreement.

A second crucial flaw in respondents' position is that it cannot be squared with the FSLMRS's expansive definition of "collective bargaining agreement." 5 U.S.C. 7103 (a)(8). As we have explained, that term is statutorily defined as any agreement "entered into as a result of collective bargaining." *Id.* It is not restrictively defined to include only comprehensive term agreements; and it plainly makes no exception for midterm agreements.

That the Statute's definition of "collective bargaining agreement" refers not just to one basic agreement covering a particular time frame, but to other accords as well, follows logically from the midterm bargaining analysis advanced by the Fourth Circuit and the respondents. Both acknowledge, for example, that the federal agency-employer must certainly bargain with respect to midterm changes that it wants to implement where the agency is exercising its management rights authority. 5 U.S.C. 7106 (b)(1)-(2). Surely, an agreement reached in connection with those negotiations is the "result of collective bargaining" (5 U.S.C. 7103(a)(8)) and constitutes a "collective bargaining agreement" within the meaning of the Statute. *Id.*[1] Respondents never offer an explanation as to what else such an agreement would be.[2]

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[1] The same, of course, is true with respect to the "local agreement[s]" referenced in 5 U.S.C. 7114(c)(4).

[2] Wordplay that suggests that such agreements are "modifications" of the initial agreement does not help respondents. Resp. Br. at 16 & n.4. Midterm issues, including those advanced by management, often relate to new matters not addressed at all by the initial term agreement.

Other provisions of the Statute confirm that agreements other than the basic term agreement constitute "collective bargaining agreement[s]" as defined by section 7103(a)(8). Section 7114(b), for example, requires negotiations for collective bargaining agreements to be conducted in good faith. The FLRA applies the listed obligations exemplifying good faith to all agreements, not simply to basic term agreements.[3] Similarly, section 7114(c)(1) subjects agreements to approval by the head of the agency. That provision permits agency heads to disapprove provisions of a midterm agreement, in addition to provisions contained in basic term agreements. *See, e.g., National Treasury Employees Union and HHS, Office of Hearings & Appeals*, 44 F.L.R.A. 293 (1992); *National Treasury Employees Union and Treasury, Bureau of Alcohol, Tobacco & Firearms*, 41 F.L.R.A. 1106 (1991). It seems highly unlikely that respondents would relinquish a right to agency head disapproval of side agreements or memoranda of understanding or a right to an executed memorialization of such agreements, although that is the logical consequence of their argument here.[4]

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[3] Any agreement on which authorized representatives have come to a meeting of the minds—including the product of midterm negotiations—must be executed, upon request of a party, under 5 U.S.C. 7114(b)(5). *United States Dep't of the Navy, Portsmouth Naval Shipyard and FEMTC*, 44 F.L.R.A. 205, 206 (1992). This obligation extends, for example, to memoranda of understanding arrived at in "partnership" discussions (*United States Dep't of Transp., FAA, Standiford Air Traffic Control Tower and NATCA*, 53 F.L.R.A. 312 (1997)) and to agreements on ground rules for term negotiations (*United States Dep't of Health and Human Serv., Region VII and NTEU*, 14 F.L.R.A. 258 (1984)).

[4] Ignoring the use of the term "collective bargaining agreement" in these sections of the Statute, respondents point to other sections in contending that our reading of the term is incorrect. Resp. Br. at 17. Contrary to their claim, however, the statutory authority provided to the FLRA by section 7118(a)(7)(B) to order the parties to "renegotiate" a collective bargaining agreement does not suggest that the term defines only basic agreements. Indeed, the FLRA has invoked its remedial authority under this section to

Respondents offer no support whatsoever, either in the language of the Statute or in the case law, for their contrary view that "collective bargaining agreement" has always been, and must be, interpreted to be only a comprehensive term agreement. Far from "idiosyncratic," as respondents claim (Resp. Br. at 16), our position is firmly grounded in the Statute itself and in traditional labor law principles under the NLRA, its practice and its history. It is, moreover, well supported by two courts of appeals decisions (*see* NFFE Br. at 16), which the respondents are unable to distinguish in any meaningful way. *See* Resp. Br. at 25 n.10.

2. Respondents' notion that there is a "striking contrast" (Resp. Br. at 19) between the language of the Statute and the NLRA permeates their entire argument. In fact, as already suggested, there is an essential congruence between section 7114(a)(4) of the Statute and the NLRA's duty to bargain. Because the allegedly key language of section 7114(a)(4)—"arriving at a collective bargaining agreement"—does not have the restrictive

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direct an employer to bargain over unilateral midterm changes and to apply retroactively the terms of any agreement reached as a result of such negotiations. *See, e.g., United States Dep't of the Air Force, Griffiss Air Force Base and AFGE Local 2612*, 37 F.L.R.A. 570, 581-82 (1990), *aff'd*, 949 F.2d 1169 (D.C. Cir. 1991).

Respondents also err in relying on the so-called contract bar doctrine as support for their narrow definition of a collective bargaining agreement. Under that doctrine, certain types of collective bargaining agreements, as defined by the FLRA, will bar the recognition of another union. 5 U.S.C. 7111(f)(3). The FLRA limits qualifying agreements to those with sufficiently substantial terms and conditions of employment. *See United States Dep't of Health & Human Serv., Social Sec. Admin. and American Fed'n of Gov't Employees and National Fed'n of Fed. Employees*, 44 F.L.R.A. 230, 241 (1992) (finding that a memorandum of understanding may be a "lawful written collective bargaining agreement" within the meaning of section 7111(f)(3)). The mere fact that an agreement will not serve to bar the recognition of another union does not mean, however, that it is not a "collective bargaining agreement" within the meaning of section 7103(a)(12).

effect that respondents claim, that section merely reflects a general obligation to bargain, parallel to that in the NLRA.

But even more fundamentally, respondents ignore the basic similarities in the core definitions of the scope of bargaining under the two statutory schemes. In arguing that the scope of bargaining under the NLRA is substantially broader than under the Statute, respondents characterize the NLRA as imposing a dual obligation: to meet and confer with respect to wages, hours and other conditions of employment *and* to meet to negotiate an agreement. *See* Resp. Br. at 12 (citing 29 U.S.C. 158(d)). This so-called "comprehensive duty to 'bargain collectively' *whether or not* the bargaining is part of 'the negotiation of an agreement'" (*id.*) is contrasted to the allegedly more limited duty under the FSLMRS to meet and negotiate for the purpose of arriving at an agreement. *Id.* at 13 (citing 5 U.S.C. 7114(a)(4)).

This purported distinction is illusory. There is a fundamental—indeed, striking—similarity between section 8(d) of the NLRA and its primary analog in the FSLMRS, section 7103(a)(12).[5] Each of these statutory provisions imposes a broad obligation to bargain, using virtually identical language. Indeed, as this Court stated in *Fort Stewart Schools v. FLRA*, 495 U.S. 641, 644 (1990), the text of the FSLMRS, just like that of the NLRA, prescribes a general duty "to engage in collective bargaining with respect to conditions of employment . . . ." 5 U.S.C. 7102(2).

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[5] Section 7103(a)(12) defines "collective bargaining" as the "mutual obligation . . . to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment . . . ." That definition is obviously patterned on, and paraphrases, section 8(d) of the NLRA, which defines the bargaining obligation as the "mutual obligation . . . to meet at reasonable times and confer in good faith with respect to . . . conditions of employment, or the negotiation of an agreement . . . ."

Respondents make no serious attempt to deny the similarity of the two provisions, confining their discussion of section 7103(a)(12) to a perfunctory footnote (Resp. Br. 16-17 n.5).[6] That cavalier treatment is unwarranted, for it is section 7103(a)(12) that defines the scope of the duty to bargain more generally set forth in section 7102(2). *See Fort Stewart Schools v. FLRA*, 495 U.S. at 644 ("scope of the negotiating obligation is set forth in [section] 7102"). Section 7114(a)(4), like section 7114(b), focuses more on the elements of good faith negotiations. As discussed above, the legislative history of the NLRA reveals that the language "arrive at a collective bargaining agreement" merely indicates that the negotiations are to proceed in good faith, with the ultimate goal of reaching a meeting of the minds on the issue under negotiations.

When section 7103(a)(12) of the FSLMRS and section 8(d) of the NLRA are compared, it is evident that respondents have strained, to no avail, to manufacture a material distinction between the two statutes. Both statutory provisions require the parties to meet and confer in good faith, and both obviously intend that the parties' consultations move the parties closer together. While the discussions may not ultimately result in an agreement, the conclusion of an agreement is, of course, the desired end and the reason the parties are meeting. And, to the extent clarification is needed, the FSLMRS also specifically

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[6] Respondents would limit the "mutual obligation" to bargain specified in section 7103(a)(12) to whatever "obligation" is imposed elsewhere in the Statute. Resp. Br. at 16 n.5. There are only two expressly stated limitations in the Statute on the broadly stated duty to bargain, however, and those relate to the subject matter of the proposals, not to the issue here of when the duty to bargain arises. *See* 5 U.S.C. 7106, 7117(a)(1)-(2). Moreover, contrary to their assertion, the "general definition" of bargaining found in section 7103(a)(12), by definition, serves to interpret the scope of the duty to bargain found in other sections.

mandates bargaining, just as the NLRA mandates negotiations, a synonymous term.[7]

3. Respondents' argument that there is no general obligation to engage in midterm bargaining rests, in large part, on its assertion that Congress specifically identified, in 5 U.S.C. 7106(b)(2) and (b)(3), the only circumstances in which midterm bargaining is required. Resp. Br. at 19-21. But, as we have noted (NFFE Br. at 17 n.5), there is no indication that Congress intended those provisions to address the *timing* of the parties' duty to bargain. Rather, those subsections stipulate that a federal agency is required to bargain over the effects of the exercise of its management rights *whenever* it chooses to use that authority—whether it be during bargaining of an initial agreement or after such an agreement had been reached.

In maintaining that sections 7106(b)(2) and (b)(3) prescribe the only circumstances in which midterm bargaining is permitted, respondents also forget that management has an obligation to engage in midterm bargaining when it wishes to make changes in conditions of employment that do *not* implicate the management rights set forth in those sections. These include such negotiable subjects as modifications of office layouts or the institution of leave-sharing arrangements. Under respondents' logic, either agencies would have no duty to bargain about such proposed unilateral changes and could act

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[7] Respondents persist with their argument that because the FSLMRS does not include a restriction on midterm bargaining comparable to section 8(d) of the NLRA (29 U.S.C. 158(d)), it follows that Congress intended to deny unions a right to engage in any midterm bargaining. Resp. Br. at 18. As we have pointed out, however (NFFE Br. at 23), it is not at all surprising that Congress did not find it necessary to spell out, in the Statute, that the duty to engage in midterm bargaining does not extend to matters "contained in" or "covered by" the parties' agreement, given the 31 years in which that doctrine had been an unquestioned part of the fabric of labor law.

unilaterally, or they would have no right to act at all. Either outcome is flatly at odds with fundamental principles of labor law: it is axiomatic that management may propose changes in conditions of employment not covered by a collective bargaining agreement but must notify the union and bargain upon request, either as to the substance or the effects of the proposed changes.

B. The respondents continue to attack our position regarding midterm bargaining on the erroneous grounds that it conflicts with the Statute's legislative history as well as alleged "longstanding" practice under the Executive Order that governed federal sector labor relations prior to enactment of the FSLMRS. Resp. Br. at 33-37.

Interestingly, the Senate report accompanying an early version of the Statute—which was featured prominently in the Fourth Circuit's *SSA* midterm bargaining decision—is given truncated treatment in respondents' lengthy brief. *See* Resp. Br. at 36-37. This is not surprising because the report language relied upon never addressed the critical issue of whether management must bargain over a union's midterm proposal. Moreover, it accompanied a version of the FSLMRS that never became law and, further, described language that is not the same as that codified in section 7114(a) and (b). *See Amici* Br. at 20. In addition, the cited report language is "in no way anchored in" or explained by "the text of the statute" and thus is entitled to no weight. *Shannon v. United States*, 512 U.S. 573, 583 (1994).

Also unavailing is respondents' argument that our position is at odds with long-standing practice under the Executive Order. As we and the *amici* have observed (NFFE Br. at 20-21 n.7; *Amici* Br. at 23-24 n.4), precedent under the Order provides no clear resolution to the question presented by this case. Indeed, there is evidence that a mutual duty to engage in midterm bargaining did exist under that Order. *Id.* Given the (at best) ambigu-

ous state of the law under the earlier regime, respondents are hard-pressed to argue (Resp. Br. at 35) that Congress would have had any reason to reverse any "long-standing practice" under the Executive Order with respect to midterm bargaining.

C. Unable to devise a persuasive argument based on the text explicating the collective bargaining obligation of agency-employers, respondents are left with what is their essential contention: that allowing unions to engage in midterm bargaining is bad policy and, thus, at odds with the Statute's goal of ensuring an "effective and efficient Government." 5 U.S.C. 7101(b). Respondents' policy-based arguments cannot be squared with the policy choices Congress itself made in designing the FSLMRS.

1. In maintaining that union-initiated midterm bargaining makes for bad government, respondents never acknowledge, much less come to grips with, Congress' explicit declaration that collective bargaining should be encouraged because it advances the cause of an effective and efficient government. In the very same statutory section in which Congress stated that the Statute should be interpreted in a way consistent with an effective and efficient government, it also expressly found, based on "experience in both private and public employment," that giving employees the right to "participate through labor organizations of their own choosing in decisions which affect them" is in the "public interest" and "contributes to the effective conduct of public business." 5 U.S.C. 7101(a)(1).

In short, it is plain that Congress did not share the respondents' conception of collective bargaining as a destructive and wasteful undertaking. As we have demonstrated through concrete examples (NFFE Br. at 26-28), there are sound practical reasons underlying Congress' positive view of the role of collective bargaining.

2. Respondents continue to echo the Fourth Circuit's 1992 prognostications that union-initiated midterm bargaining would prompt dispersal of the collective bargaining process and lead to continuous bargaining on an issue-by-issue basis, resulting in "seriatim FSIP arbitration[s]." *SSA*, 956 F.2d at 1288. As we have explained, however, experience has shown that the court's ominous predictions were wide of the mark. The fact is that, in the 10 years since the D.C. Circuit's decision in *National Treasury Employees Union v. FLRA*, 810 F.2d 295 (1987) (*NTEU v. FLRA*), during which union-initiated midterm bargaining has been permitted everywhere but in the Fourth Circuit, FSIP arbitrations regarding union midterm proposals have been rare. *See* NFFE Br. at 26. Respondents offer no evidence to demonstrate otherwise.[8]

3. Among the melange of anti-midterm bargaining policy arguments respondents make is their contention that unions will gain a bargaining advantage if they are able to withhold proposals from term negotiations and then resurrect them later at a time when they may not face pressure to trade off those issues for other matters.[9] As

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[8] Respondents dismiss such empirical evidence, arguing instead (Resp. Br. at 31 n.13) that what matters is what Congress might have foreseen in 1978 when it enacted the FSLMRS. Of course, the best evidence we have of Congress' 1978 vision is its clear statement that experience in the private sector demonstrated that collective bargaining advanced the public interest, contributed to effective government, and facilitated amicable settlement of labor disputes. 5 U.S.C. 7101. In invoking private sector experience, Congress was surely aware of case law explicitly endorsing the beneficial role of midterm bargaining. *See, e.g., NL Indus., Inc. v. NLRB*, 536 F.2d 786, 790 n.5 (8th Cir. 1976).

[9] Respondents also reiterate the Fourth Circuit's assertion that federal sector labor organizations are more likely than their private sector counterparts to engage in "piecemeal negotiations" (Resp. Br. at 25) because the former may be eligible to engage in negotiations while on "official time." *See* 5 U.S.C. 7131(a). Respondents

we and the *amici* have pointed out, the primary utility of midterm bargaining is to address issues that the parties did not foresee during term negotiations and, indeed, *could* not foresee—such as the discovery of life-threatening health hazards in the workplace or changes in federal law that alter the scope of negotiations. *See* NFFE Br. at 27; *Amici* Br. at 28. If unions were to lose this important safety valve, their incentive to negotiate lengthy term agreements would be undermined.

In any event, midterm negotiations do not represent the disruptive force that respondents hypothesize. Respondents fail to acknowledge that agency-employers can and do engage in "withholding" of negotiable proposals. *See, e.g., Department of Treasury, IRS and National Treasury Employees Union*, 97 F.S.I.P. 31 (1997) (agency proposed midterm changes shortly after end of period designated by contract to reopen agreement to negotiate the issue). Moreover, as one commentator has suggested, if both parties have comparable bargaining leverage, they are less likely to employ such "withholding" strategies, and the opportunity for the parties to achieve a stable equilibrium will be enhanced.[10]

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fail to appreciate that paid status for private sector employee negotiators is common; it is well established that bargaining for such an arrangement is a negotiable condition of employment. *See Axelson, Inc. v. NLRB*, 599 F.2d 91, 94-95 (5th Cir. 1979); *Logemann Brothers Co.*, 298 N.L.R.B. No. 155 (1990). It should be noted that when Congress authorized the use of "official time" in the federal sector, it did so well aware of the fact that agency officials are in a paid status when negotiating agreements. *See* 124 Cong. Rec. 29188 (1978) (statements by Rep. Clay); 124 Cong. Rec. 29200 (1978) (statements by Rep. Ford).

[10] *See* Frank D. Ferris, *Union-Initiated Mid-Term Bargaining: A Catalyst in Reshaping Conflict Patterns*, 5 Negotiation J. 407, 412-414 (Oct. 1989). That respondents' position rests, not on the law, but on their policy views regarding midterm bargaining, is made abundantly clear by their extensive—but selective—quotations from this cited article written nine years ago. The article, whose

Respondents' further suggestion (Resp. Br. at 24) that federal sector labor organizations will be impelled to pose a barrage of midterm proposals because of the "peculiar nature" of issues that arise in federal sector bargaining is without merit. Respondents contend that federal sector bargaining is without "core issues"—like economic benefits or job security—and that therefore federal sector labor organizations focus mainly on other allegedly more peripheral issues that need not be secured by a comprehensive agreement and thus are likely to be the subjects of frequent midterm proposals.

This characterization of the federal sector bargaining system is simply wrong. It is the usual practice in the federal sector to have comprehensive master agreements that address a wide range of issues. They typically include such "core issues" as performance appraisal systems, reductions-in-force and employee cash awards, as well as other issues relating to working conditions that respondents apparently deem less critical. As indicated *supra*, there is no evidence that federal sector experience

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title page bears the caption "In Theory," reflects the commentator's speculations about the potential impact of midterm bargaining. Respondents do not acknowledge that the commentator's thesis was that recognition of union-initiated midterm bargaining would foster healthier collective bargaining relationships by creating greater bargaining parity between the parties. Among other things, the commentator hypothesized that it would encourage more comprehensive term agreements, reduce the filing of unfair labor practices, and permit the parties to solve problems more efficiently.

The premise underlying the commentator's view that union-initiated midterm bargaining might provide unions with potentially added leverage does not reflect applicable law. That assessment was grounded on the understanding that an agency-employer could avoid midterm bargaining only by showing that the union had clearly and unmistakably waived its right to bargain over a particular matter. *Id.* at 415-416. As explained, *infra* at 15, the law is clear that an agency need only show that a matter is "covered by" the parties' collective bargaining agreement in order to defend against an obligation to bargain midterm.

with midterm bargaining has actually differed in any discernible way from that in the private sector.

4. As the petitioners and the *amici* have observed, the respondents' concerns that midterm bargaining would undermine stability and repose in the parties' labor-management relationship are unwarranted. Among other things, respondents fail to appreciate sufficiently the well-established principle that an agency's midterm bargaining obligation does not extend to matters that are "covered by" or "contained in" an initial collective bargaining agreement. *United States Dep't of Health & Human Serv. and American Fed'n of Gov't Employees*, 47 F.L.R.A. 1004 (1993).[11] Hence, by virtue of the "covered by" principle, agency-employers are well positioned to protect themselves from union-initiated midterm bargaining by addressing issues in the parties' term agreement.

Respondents object that the "covered by" principle does not give them complete insurance against any midterm bargaining obligation. Resp. Br. at 30. But, of course, they have no entitlement to that. Moreover, respondents' protests about the "covered by" principle—and, for that matter, the other alleged negative ramifications of midterm bargaining—ring hollow given their earlier insistence that this Court should not grant our petition for certio-

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[11] The FLRA's precedent establishes a three-part inquiry for determining whether a matter is "covered by" a collective bargaining agreement. First examined is whether the matter in question is expressly contained in the agreement. 47 F.L.R.A. at 1018. If the provision does not expressly encompass the matter, the next step is to decide whether the subject is "commonly considered to be an aspect of the matter set forth in [a] provision." *Id.* If so, the negotiations will be "presumed to have foreclosed further bargaining over the matter, regardless of whether it is expressly articulated in the provision." *Id.* Where it is difficult to determine whether the matter at issue is an aspect of matters already bargained, the FLRA examines whether "the parties reasonably should have contemplated that the agreement would foreclose further bargaining in such instances." *Id.* at 1019.

rari because the breadth of the "covered by" principle had substantially limited the federal employer's duty to engage in midterm bargaining, leaving the issue presented by this case without "enough practical significance." Resp. opp'n to pet. for cert. at 11.

5. Finally, we adhere to our contention that the respondents' analysis conflicts with Congress' goal of strengthening "the position of public employee unions" (*Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 92 (1983)) and creating greater equality between labor and management. *See, e.g., NTEU v. FLRA*, 810 F.2d at 300. Under the respondents' view of federal sector collective bargaining, federal agencies would be free to instigate midterm changes in working conditions—as to which unions would be obligated to bargain to protect the interests of their members—but unions would be entirely powerless to initiate midterm proposals of their own. Such an outcome cannot fairly be characterized as "entirely equitable." Resp. Br. at 32.

Respondents, further, disparage our concern that their position would prevent labor organizations from making proposals regarding vital unforeseen matters such as the discovery of health hazards in the workplace. Resp. Br. at 32-33. They suggest, for example, that employees need have no worries about health hazards in the workplace because federal agencies unilaterally "fix them." *Id.* at 33. We are informed that this facile assurance is not consistent with employees' experience. Nor is it reassuring for respondents to insist that such pressing matters can always be addressed "at the beginning of a new collective bargaining term." *Id.* Union negotiators are not so prescient that they always succeed in "anticipating workplace contingencies." *Id.* Finally, it is not consistent with the Statute's goal of creating greater equality between the parties to insist that unions act only in response to initiatives that a federal agency-employer may—or may not—undertake.

## CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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